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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JEREMY DEAN GARCIA, Appellant.	2 CA-CR 2008-0020 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200701020

Honorable Stephen F. McCarville, Judge

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Appellant Jeremy Garcia was convicted after a jury trial of eight counts of sexual abuse, six counts of child molestation, three counts of attempted child molestation, and one count each of attempted sexual conduct with a minor and sexual conduct with a minor over age fifteen. He asserts there was insufficient evidence to support ten of his convictions and that the trial court imposed illegal sentences for three of his convictions.

Factual and Procedural Background

¶2 On appeal, we view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Garcia's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Between September 2000 and April 2006, Garcia engaged in sexual behavior with five minors—his two daughters, A. and B., two of his daughters' friends, K. and T., and his daughters' former babysitter, J.

¶3 J. met Garcia in Maricopa County in 1999, when she was fifteen years old, and began babysitting for him. Shortly thereafter, J. moved into Garcia's Maricopa County home to help care for his children and she and Garcia began a sexual relationship. In 2000, Garcia and J. moved to Pinal County, where their sexual relationship continued through J.'s majority.

¶4 B. is Garcia's oldest daughter. In December 2004, when B. was twelve years old, Garcia touched her breasts while she and her sister, A., were watching a movie. In April 2006, Garcia again touched B.'s breasts.

¶5 In 2005, when A. was eight years old, Garcia asked A. if she would touch his penis and if he could "touch [her]" sexually. As he made his requests, Garcia "move[d] toward [A.]," who declined and walked away to her room. The same year, Garcia "reached inside [A.'s] pajamas and . . . underwear and fondled [her] buttocks" as she kissed him goodnight. On at least one occasion over this same period, Garcia reached up A.'s shirt and touched her breasts.

¶6 K. was a friend of Garcia's daughter, A. K. often spent time at Garcia's home to visit with A. In May 2005, when K. was ten years old, she spent the night at Garcia's home. While K. and A. sat under a blanket watching a movie, Garcia sat next to K., put his hand up her shirt, and rubbed her breasts. Garcia also unzipped K.'s pants, reached into her underwear, and rubbed her vagina. Garcia had touched K. in the same way on at least five prior occasions while K. was at Garcia's home visiting A.

¶7 T. was B.'s best friend. In July 2005, when T. was thirteen years old, she attended B.'s thirteenth birthday party at Garcia's home. T. wore shorts to the party. While at the party, Garcia, who had been drinking, placed his hand on T.'s inner thigh, running it up her leg to within five inches of her "private area," and left it there until T. became uncomfortable and walked away. Later that evening, Garcia also put his hands on T.'s waist and shoulders, moved his hands "an inch or two" from T.'s breasts, and "rubb[ed] [T.'s] butt."

¶8 In a twenty-six count indictment, a grand jury charged Garcia with: sexual abuse, attempted sexual conduct with a minor, and two counts of attempted child molestation

of A.; two counts of sexual abuse of B.; nine counts of sexual abuse and nine counts of child molestation of K.; attempted child molestation of T.; and sexual conduct with a minor, J. After a four-day trial, the jury acquitted Garcia of three counts of child molestation of K. and three counts of sexual abuse of K., but found Garcia guilty of the remaining charges. All of the convictions, except the sexual conduct with J., are dangerous crimes against children. *See* A.R.S. § 13-705(N). At the sentencing hearing, the trial court entered judgment of acquittal on an additional count of sexual abuse of K. The court sentenced Garcia to a combination of concurrent and consecutive terms of imprisonment totaling 132 years. This appeal followed.

Discussion

Sufficiency of the evidence

¶9 Garcia contends there was insufficient evidence to support several of his convictions. In reviewing the sufficiency of the evidence, we view the facts in the light most favorable to upholding Garcia's convictions and resolve all reasonable inferences against him. *See State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003). "We will not disturb a defendant's conviction unless there is a complete absence of probative facts to support the verdict, and unless rational jurors could not have found the defendant guilty beyond a reasonable doubt." *Id.* (citation omitted); *see also State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

Attempt convictions

¶10 Garcia contends insufficient evidence supported his convictions of attempted sexual conduct with a minor and attempted child molestation of A. Relying on *State v. Celaya*, 27 Ariz. App. 564, 556 P.2d 1167 (1976) and *State v. May*, 137 Ariz. 183, 669 P.2d 616 (App. 1983), Garcia contends a person commits attempt only if he completes "a substantial step," beyond "[m]ere preparation," "in a course of conduct designed to culminate in a crime." He reasons that his "merely asking" A. to touch him and asking if he could touch her, without additional evidence that he "persisted in any way," "did not go beyond mere preparation" and therefore cannot support his attempt convictions.

¶11 But the reasoning in *Celaya* upon which Garcia relies is based on our state's former attempt statute, A.R.S. § 13-108, which defined the crime of attempt as "the performance of an act immediately and directly tending to the commission of the crime with the intent to commit such crime, the consummation of which fails on account of some intervening cause." *See State v. Fristoe*, 135 Ariz. 25, 29, 658 P.2d 825, 829 (1982). In 1978, our legislature adopted A.R.S. § 13-1001, the current attempt statute, which requires in subsection (A)(2), in contrast, that a person "[i]ntentionally do[] . . . anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense." *See* 1978 Ariz. Sess. Laws, ch. 201, § 122. In adopting the "any step" language of § 13-1001(A)(2), moreover, the legislature rejected the Arizona Code Commission's suggestion that a person may not be found guilty of

an attempt to commit a crime unless the person has taken a "substantial step" toward committing the crime. *Fristoe*, 135 Ariz. at 29, 658 P.2d at 829.

¶12 Garcia's reliance on *May* is equally misplaced. Although Division One of this court concluded the defendant in that case had "completed a substantial step in his course and design to culminate in . . . aggravated assault," the fact that the defendant's steps were "substantial" was immaterial to the court's conclusion. *May*, 137 Ariz. at 187, 669 P.2d at 620. Rather, the court correctly noted that "a person commits attempt if such person intentionally does anything which is a step in a course of conduct planned to culminate in the commission of an offense." *Id.*; *see* § 13-1001(A)(2). Indeed, in the years following the adoption of § 13-1001, our courts repeatedly have stated that the crime of attempt merely requires a person to take "any step," not a substantial step, toward the commission of a crime. *See, e.g., State v. Williams*, 183 Ariz. 368, 382, 904 P.2d 437, 451 (1995); *State v. Cleere*, 213 Ariz. 54, ¶ 6, 138 P.3d 1181, 1184 (App. 2006); *Fristoe*, 135 Ariz. at 29, 658 P.2d at 829.

¶13 A person commits child molestation if he "intentionally or knowingly engag[es] in or cause[s] a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age." A.R.S. § 13-1410. Sexual contact is "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13-1401(2). Thus, a person commits attempted child molestation by intentionally taking "any step" planned to culminate in directly or indirectly touching the genitals or anus

of a child under fifteen. §§ 13-1001(A)(2); 13-1410; 13-1401(2). Similarly, a person commits attempted sexual conduct with a minor if he intentionally takes "any step" planned to culminate in "sexual intercourse or oral sexual contact," including "masturbatory contact," with anyone under the age of eighteen. §§ 13-1001(A)(2); 13-1405; 13-1401(3).

¶14 A. testified that Garcia had asked her to touch his penis and had asked to touch her sexually. Our supreme court has stated that "words may be . . . sufficient to sustain a conviction for an attempt when viewed in . . . light of the circumstances in which they were uttered." *State v. Dale*, 121 Ariz. 433, 435, 590 P.2d 1379, 1381 (1979). And, as the state notes, Division One of this court has found verbal requests similar to Garcia's sufficient to constitute a "step" supporting an attempt conviction. *Fristoe*, 135 Ariz. at 30-31, 658 P.2d at 830-31.

¶15 Garcia, nonetheless, insists *Fristoe* is distinguishable because, unlike here, the defendant in that case "had gone well beyond merely asking" the minors to have sex with him by also offering them money to do so, establishing "the intent on [the defendant's] part to carry out the crime." *See Fristoe*, 135 Ariz. at 31, 658 P.2d at 831. Attempt requires that a defendant: (1) complete "any step" toward the commission of a crime and (2) intend his actions to culminate in the commission of the crime. *See* § 13-1001(A)(2). In *Fristoe*, the court determined that, because the defendant had made the sexual requests to girls eleven and fifteen years of age and had "driv[en] his vehicle up to each victim, [the defendant's] words constituted acts sufficient to sustain a conviction for attempt viewed in light of the

circumstances in which they were uttered." *Fristoe*, 135 Ariz. at 29, 31, 658 P.2d at 829, 831. That the defendant later offered the girls money was not material to the court's determination of whether he had taken a step toward the commission of a crime but, rather, to whether the defendant had "intended to commit the crime if he were successful in persuading any of the girls to accept his offer." *Id*. at 31, 658 P.2d at 831.

¶16 Here, the state presented evidence that Garcia had made multiple sexual requests to A., an eight-year-old girl, and "mov[ed] toward" her as he did so. In light of those circumstances, a reasonable jury could conclude Garcia's requests were a step toward molesting and engaging in sexual conduct with A. *See id.; see also Arredondo*, 155 Ariz. at 316, 746 P.2d at 486; §§ 13-1001(A)(2); 13-1405; 13-1410; 13-1401(2), (3). Insofar as Garcia argues he was "merely making flippant remarks to [A.] with no plan to carry out the acts even if [she] would agree to let him," the evidence indicates otherwise. *Fristoe*, 135 Ariz. at 31, 658 P.2d at 831. Several young girls, including A., testified at trial that Garcia had repeatedly touched or attempted to touch them sexually. *See* Ariz. R. Evid. 404(b) (evidence of other crimes, wrongs, or acts admissible to prove, inter alia, intent, plan, absence of mistake or accident) and 404(c) (other crimes, wrongs, or acts may be admissible to show "aberrant sexual propensity to commit the offense charged"). "The total factual picture," viewed in the light most favorable to sustaining the jury's verdicts, "shows a man determined to find a young girl [who would] allow him to have . . . sexual contact with her." *Fristoe*, 135 Ariz. at 31, 658 P.2d at 831; *George*, 206 Ariz. 436, ¶ 3, 79 P.3d at 1054. Sufficient evidence

supported the jury's conclusion Garcia had taken steps that he had intended to culminate in touching A. sexually and A. touching his penis, thereby committing attempted child molestation and attempted sexual conduct with a minor. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486 (we uphold verdict unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury"); §§ 13-1001(A)(2); 13-1405; 13-1410; 13-1401(2), (3).

¶17 In a similar argument, Garcia asserts the evidence that he "placed his hand on [T.'s] inner thigh and moved it to within five to ten inches of her private area" was insufficient to support his conviction for attempted child molestation of T. because his conduct "did not constitute a substantial step towards completion of a crime." But, as we have explained, one need only take "any step," not necessarily a substantial one, intended to culminate in touching the genitals or anus of a child under fifteen to commit attempted child molestation. T. testified, and Garcia does not dispute, that while hosting his daughter's birthday party at his home, Garcia had moved his hand up T.'s bare leg to within a few inches of her "private area" in a manner that made her uncomfortable. Several young girls testified that, the same evening, Garcia had also rested his hands on T.'s waist and shoulders, touched near T.'s breasts, and "grabb[ed]" T.'s buttocks. Given that evidence, the jury reasonably could have concluded Garcia's touching T.'s leg was a step planned to culminate in molesting T. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486; §§ 13-1001(A)(2); 13-1410, 13-1401(2).

¶18 Garcia next argues there was insufficient evidence to support his conviction of attempted child molestation of A. by reaching into A.'s underwear and touching her buttocks. Garcia does not dispute he "gripped A[.]'s buttocks [inside her underwear] while she was giving him a goodnight kiss," as the indictment alleged. Nonetheless, Garcia contends this conduct "does not meet the statutory definition of attempted child molestation."

¶19 As previously noted, a person commits attempted child molestation by intentionally taking "any step" planned to culminate in sexual contact—that is, directly or indirectly touching the genitals or anus—of a child under fifteen. §§ 13-1001(A)(2); 13-1410, 13-1401(2). Garcia asserts that, because buttocks are not included in the definition of sexual contact, "the act of grabbing the buttocks without any additional act does not amount to either child molestation or an attempt at child molestation." He adds, "There was no testimony that he did anything beyond [touching A.'s buttocks inside her underwear], or that he attempted to touch her genitalia or her anus," and no evidence his conduct went "beyond a normal show of affection."

¶20 But Garcia has not cited, nor have we found, any authority supporting his apparent suggestion that reaching inside a child's underwear to fondle her buttocks cannot support a conviction of attempted child molestation. A. testified that, while she was kissing Garcia goodnight, he had reached inside her pajamas and underwear and fondled her buttocks until she pulled away, breaking the contact. Given this evidence, as well as the evidence of Garcia's other sexual behavior with A. and other children, a reasonable jury could have

concluded Garcia intentionally fondled A.'s buttocks, planning to progress to fondling her vagina or anus. *See* A.R.S. §§ 13-1001(A)(2), 13-1401, 13-1410; *Arredondo*, 155 Ariz. at 316, 746 P.2d at 486; *George*, 206 Ariz. 436, ¶ 3, 79 P.3d at 1054; *see also* Ariz R. Evid. 404(b), (c).

Sexual abuse of A. and K.

¶21 Garcia next raises several theories in support of his argument that insufficient evidence supported his convictions for sexually abusing A. and K. by touching their breasts. A person commits sexual abuse if he, inter alia, directly or indirectly touches, fondles or manipulates "the female breast" of a person under the age of fifteen. A.R.S. §§ 13-1404(A); 13-1401(2).

¶22 Garcia first asserts A., when describing where Garcia touched her, "referred to her chest, not her breast," which "does not meet the statutory definition of sexual abuse." But, as the state notes, the prosecutor repeatedly asked A. whether Garcia had touched her "breasts," and A. responded that he had. Nevertheless, Garcia emphasizes that "[i]t was the prosecutor," not A., "who referred to A[.]'s breast," and "A[.] only referred to her chest." Because "[t]he chest area could have been anywhere on her front upper torso," Garcia reasons, A.'s testimony was too "vague" to conclude he had touched her breast. But A., in order to supplement her testimony, indicated on a toy precisely where Garcia had touched her. Although the record does not contain a video recording or other source allowing us to review the content of A.'s demonstration, we must assume it supports the jury's conclusion that

Garcia had touched A.'s breasts. *See State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996) (in absence of complete record, we assume absent portions would support verdict).

¶23 In his reply brief, Garcia suggests for the first time his indictment was defective because its "plain wording . . . charge[d] [him] with touching A[.]'s chest, which is not a crime under A.R.S. § 13-1404(A)." Garcia further asserts the indictment "was never amended to conform to the evidence." Arguments raised for the first time in a reply brief are generally waived. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005). Garcia, moreover, did not challenge the indictment below and, therefore, is precluded from raising the issue on appeal. *See State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006) (suggesting failure to object to defects in charging documents may not be subject to fundamental error review); *see also* Ariz. R. Crim. P. 13.5(e) and 16.1(c); *State v. Anderson*, 210 Ariz. 327, ¶¶ 13-18, 111 P.3d 369, 377-78 (2005). At any rate, an indictment is automatically "deemed amended to conform to the evidence adduced at [trial]" to "correct mistakes of fact." Ariz. R. Crim. P. 13.5(b). As discussed above, evidence was presented at trial that Garcia had touched A.'s "breasts."

¶24 Garcia next contends § 13-1404(A)'s prohibition of sexual contact with "the female breast" of a child under fifteen does not apply to "a child with no indicia of breast development" but, rather, only applies to "a child under the age of fifteen who is either pubescent or prepubescent and does have developing breasts." Thus, he reasons, his touching

A. and K. could not, as a matter of law, constitute sexual abuse because "[t]here was no evidence" A. or K.—who were under eleven years old at the time of the offenses—"had breasts" and "no testimony from anyone as to when these girls had entered puberty."

¶25 Insofar as Garcia's argument raises an issue of statutory interpretation, we review it de novo. *See State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003). "In any case involving statutory interpretation we begin with the text of the statute," which is "the best and most reliable index of a statute's meaning." *Id.* Only "'[w]hen a statute is ambiguous or unclear, . . . [will] we attempt to determine legislative intent by interpreting the statutory scheme as a whole and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.'" *State v. Ross*, 214 Ariz. 280, ¶ 22, 151 P.3d 1261, 1264 (App. 2007), *quoting Hughes v. Jorgenson*, 203 Ariz. 71, ¶ 11, 50 P.3d 821, 823 (2002); *see also State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, ¶ 12, 75 P.3d 1075, 1078 (App. 2003) ("Words are 'ambiguous only when [they] can reasonably be construed to have more than one meaning.'"), *quoting Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992) (alteration in *R.J. Reynolds*).

¶26 The text of § 13-1404(A) does not specify whether a breast must be developed or developing, only that it be a female breast. Although the Arizona Revised Statutes do not define "female breast," we generally construe words and phrases "according to the common and approved use of the language." A.R.S. § 1-213. We may turn to dictionary definitions for such common usage. *See State v. Sharma*, 216 Ariz. 292, ¶ 15, 165 P.3d 693, 697 (App.

2007); *State v. Korovkin*, 202 Ariz. 477, ¶ 15, 47 P.3d 1131, 1135 (App. 2002). *The American Heritage Dictionary* 109 (4th ed. 2001), defines "breast" as: (1) "The mammary gland, esp. of the human female," and (2) "The upper front of the human body from the neck to the abdomen." Thus, contrary to Garcia's contention, neither the text of the statute nor the definition of "breast" requires a "female breast" to be sexually developed or developing. Moreover, to adopt Garcia's definition of "breast" as a developed or developing mammary would render the legislature's use of the word "female" largely superfluous and redundant. *See State v. Brown*, 204 Ariz. 405, ¶ 16, 64 P.3d 847, 851 (App. 2003) ("[W]e must give meaning to each word or phrase so that none 'is rendered superfluous, void, contradictory or insignificant.'"), *quoting State v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976). Rather, the plain meaning of § 13-1404(A)—that is, the sole reasonable interpretation of its words—requires only that a person touch or fondle on or near the mammary gland, whether developed or not, of a female under the age of fifteen. *See R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, ¶ 12, 75 P.3d at 1078.

¶27 As the state notes, the Alaska Court of Appeals reached the same conclusion in interpreting a statute nearly identical to § 13-1404(A). *See Stephan v. State*, 810 P.2d 564 (Alaska Ct. App. 1991). Alaska's sexual abuse statute proscribed sexual contact with, inter alia, the "female breast" of a child under thirteen. *Id*. at 565. The defendant, who had been convicted of sexual abuse of a nine-year-old girl, argued on appeal that "female breast" could only reasonably be interpreted to refer to developed female breasts and, because his victim

was prepubescent, insufficient evidence supported his conviction of sexual abuse. *Id.* Because the term "female breast" was not defined in Alaska's statutes, the court looked to a dictionary to determine its meaning. *Id.* at 566. The court then concluded that "[n]either the age of the female nor the degree of the physical development of the breasts [wa]s crucial to [its] understanding of the term," and that "the only function of the word 'female' before the word 'breast' is to exclude males from the definition." *Id.* The court further reasoned that "[b]ecause the distinction [between developed and undeveloped breasts]" was absent from the statute's text, "the court c[ould] infer that none was meant to be drawn." *Id.* at 567. In rejecting the defendant's suggested interpretation, the court concluded that "[u]nder [the defendant's] theory, all prepubescent girls would be defenseless to the touching and fondling of their breasts[,] . . . defeat[ing] the apparent purpose of the law." *Id.* at 568.

¶28 Garcia insists we "should not follow *Stephan*, since it is from another state and since the reasoning does not make sense." But when courts in other jurisdictions have interpreted similar statutes, we may find those decisions persuasive. *See Mohave County v. City of Kingman*, 160 Ariz. 502, 505, 774 P.2d 806, 809 (1989). Garcia, moreover, does not explain why he believes the reasoning in *Stephan* nonsensical. For the aforementioned reasons, we conclude § 13-1404(A) proscribes sexual contact with the female breast, regardless of its developmental stage, of a person under fifteen years of age.

¶29 In passing, Garcia also argues that, "[a]s to A[.], there was no evidence to specify when the touching occurred." Because Garcia fails to develop this argument in any

meaningful way, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

Sentencing under A.R.S. § 13-705

¶30 Garcia contends the trial court improperly sentenced him under A.R.S. § 13-705[1] for his convictions of attempted child molestation of A. by fondling her buttocks and asking to touch her sexually, counts three and five of the indictment, and his conviction of attempted sexual conduct with a minor for asking A. to touch his penis, count six of the indictment. Relying on *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), he asserts § 13-705 does not encompass attempted crimes against children under the age of twelve, and that the victims here "were clearly under the age of eleven at the time of the alleged offenses."

¶31 Section 13-705 defines dangerous crimes against children and governs sentencing for those crimes. Attempted child molestation and attempted sexual conduct with a minor are second-degree dangerous crimes against children. § 13-705(N). The sentence for a second-degree dangerous crime against children is prescribed by subsection (J), which states

[1]The version of § 13-705 in effect at the time Garcia committed his offenses has been amended and renumbered. Because the operative language has remained unchanged, however, we refer to the current version of the statute. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7; 2005 Ariz. Sess. Laws, ch. 2, § 1; 2005 Ariz. Sess. Laws, ch. 188, § 2; 2005 Ariz. Sess. Laws, ch. 282, § 1; 2005 Ariz. Sess. Laws, ch. 327, § 2; 2006 Ariz. Sess. Laws, ch. 295, § 2; 2007 Ariz. Sess. Laws, ch. 248, § 2; 2008 Ariz. Sess. Laws, ch. 97, § 1; 2008 Ariz. Sess. Laws, ch. 195, § 1; 2008 Ariz. Sess. Laws, ch. 219, § 1; 2008 Ariz. Sess. Laws, ch. 301, § 17, 29; *see also Gonzalez*, 216 Ariz. 11, n.2, 162 P.3d at 652 n.2.

a person "who stands convicted of a dangerous crime against children in the second degree pursuant to subsection C or D of this section is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years." Subsection (C), however, encompasses only sexual conduct with a minor "who is twelve, thirteen or fourteen years of age." Therefore, we determined in *Gonzalez* "that the plain language of § 13-[705] does not encompass attempted sexual conduct with a victim under the age of twelve."[2] 216 Ariz. 11, ¶ 9, 162 P.3d at 652-53. Because the jury found the victim "'was under 15 years of age at the time of the offense,' [but] did not determine the victim's precise age," *id.* ¶ 3, we remanded the case to the trial court for resentencing, instructing the trial court to "hold a hearing, if necessary, to establish the victim's age" and directing the court to resentence the defendant if he committed the offense when the victim was under the age of twelve. *Id.* ¶ 15. Similarly, here, for count six, attempted sexual conduct with A., the jury did not determine the victim's precise age, and the case must be remanded for that determination and any necessary alteration to Garcia's sentence.

¶32 The state agrees that, if A. was under the age of twelve, Garcia must be resentenced for count six, but argues § 13-705 does encompass attempted molestation of a child under the age of twelve and Garcia's sentences for counts three and five are therefore proper. We agree. Section 13-705(D) includes "molestation of a child" without further

[2]We noted in *Gonzalez* that it is unlikely the legislature intended this result, but that we "are bound to interpret [the statute] as it is written." 216 Ariz. 11, ¶ 10, 162 P.3d at 653.

restricting the applicable age as subsection (C) does for sexual conduct with a minor. Thus, *Gonzalez* does not apply to attempted child molestation and Garcia's sentences for these crimes are proper under § 13-705(J).

Disposition

¶33 We affirm Garcia's convictions and sentences except for his sentence for attempted sexual conduct with a minor as alleged in count six. We remand the case to the trial court for the state to establish the victim's age and for Garcia to be resentenced on that count if necessary.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge